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Supreme Court, U.S.
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No. _____

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In the
Supreme Court of the United States

FRANK GARNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I Where a police officer, while investigating a routine traffic stop, expressly authorizes the passenger to exit the vehicle and depart the area, can this officer later empower a fellow officer to retrieve and return the passenger (now a pedestrian) to the scene because the officer was simply curious about what was in a duffle-like bag he was carrying?

II Where a police officer testifies to facts that show he made a seizure (or arrest, as the case may be) of a pedestrian solely because he was asked to do so by a fellow officer, can the question as to the constitutional basis for this encounter turn on anything other than whether the officer who requested the action be taken could have taken the identical action himself?

III When a reviewing court rejects the district court's opinions that a valid arrest for a specific crime had occurred and that the contraband was lawfully seized incident to that arrest, can the reviewing court avoid reversing the conviction by the simple expedient of making a factual finding on a disputed issue that was left unresolved by the trial judge?

PARTIES TO THE PROCEEDING

Petitioner

The petitioner, Frank Garner, has no corporate affiliations.

Respondent

The respondent is the Solicitor General of the United States of America.

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Where a police officer, while investigating a routine traffic stop, expressly authorizes the passenger to exit the vehicle and depart the area, can this officer later empower a fellow officer (who subsequently arrives on the scene) to retrieve and return the passenger (now a pedestrian) to the scene because the officer was simply curious about what was in a duffle-like bag he was carrying. 14

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The petitioner, Frank Garner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on September 5, 2002, and made final by order of that Court on November 13, 2002 when that Court denied the petitioner's *Motion For Rehearing and Rehearing En Banc*. (See *Appendix To Petition For Writ Of Certiorari*, Appendix "A," p. 1a, et. al..)

OPINIONS BELOW

The Opinion of the Court of Appeals affirming the Order rendered by the District Court to date has not been formally reported. It is included in the *Appendix* as Appendix "B," p. 3a, et al.

The Order of the United States District Court is formally reported as *United States v. Garner*, 108 F. Supp. 796 (D.C. Ohio, 2000). The original Order rendered by the District Court is attached here as Appendix "C," p. 31a, et. al.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Sixth Circuit was entered on September 5, 2002. A seasonably filed *Motion For Rehearing and Rehearing En Banc* was denied on November 13, 2002. This *Petition For Writ Of Certiorari* is being filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The principal provisions of the United States Constitution involved in this case are the search and seizure clause of the Fourth Amendment and the self-incriminating clause of the Fifth Amendment. The pertinent text of these reads as follows:

Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

> "No person ... shall be compelled in any criminal case to be a witness against himself...."

STATEMENT OF THE CASE AND FACTS

SEIZURE, ARREST AND SEARCH

This *Petition* arises out of an incident in Cleveland, Ohio that occurred May 16, 2000. Petitioner was a passenger in a 1998 Ford Expedition that was being driven by his co-defendant, one Lindira Hubbard. The vehicle here being referred to, which was seen by officer O'Neill, was being operated without a front license plate, in violation of "both

the Ohio Revised Code and City of Cleveland Ordinance §435.09." *United States v. Garner*, 108 F. Supp. 796, at 798 (N.D. of Ohio, 2000).

Based on this minor violation, the vehicle was stopped. While O'Neill was dealing with Hubbard in connection with this traffic offense, Garner exited the vehicle after telling the officer he was late for work and proceeded to walk away (*id.*, p. 799). The District Court held that the officer only *allowed* Garner to walk away because the officer was alone and because this was so, petitioner nonetheless was in violation of a valid order by the officer. According to the District Court, this fact empowered officer O'Neill to direct a brother officer, who by then had arrived on the scene, to retrieve petitioner (then a pedestrian) who was about 200 feet down the street, and to bring him back to the scene of the traffic offense.

As to why officer O'Neill wanted this done, he was brazenly frank. The officer's clear, and most precise, testimony shows his ulterior reasons for wanting Garner seized had nothing whatsoever to do with his investigation of the driver or the driver's traffic offense. Specifically and informatively it was said:

> Q. *You didn't tell [officer] Wilson* to bring this man back because *I want to give him a seat belt violation, did you?*
>
> A. *No, I did not.*
>
> Q. As a matter of fact ... *you told [officer] Wilson that you suspected the male was trying to hide something, correct?*

A. *That's correct.*

* * *

Q. *Well, did you have any information as to what was inside that bag?*

A. *No.*

Q. No. But you wanted to look in the bag, correct?

A. *I was curious what was in the bag.*

Q. *And that's why you told [officer] Wilson to bring him back?*

A. Yes.

Tr., pp. 42-43. (Emphasis supplied.)

Given this utterly compelling testimony, the following segment of the Sixth Circuit's Opinion, which failed to show any recognition of its significance, is worth repeating. Here the Court wrote:

> ...[T]he district court's reasoning that Garner had violated an Ohio statute by disobeying a lawful order of a police officer [*i.e.*, R.C. of Ohio, §2921.33(A) and 2935.03(A)], thus, entitling the officer *to place Garner under arrest*, is faulty.
>
> However, other facts, objectively viewed, do give rise to a finding of reasonable suspicion

warranting a stop of Garner.[1] *O'Neill was aware* that Garner urgently wanted to leave, regardless of the reason given. He also *was aware* that Garner was accompanying a driver who was not the owner of the vehicle, *that the vehicle's actual owner was in jail*,[2] and that the driver had no license. Also, the driver, Hubbard, had stated that there may be a warrant outstanding for his arrest. *O'Neill was unaware* of any bag until Garner removed it from the vehicle to carry it with him.

Based on these facts, O'Neill had reasonable suspicion sufficient to stop Garner. Furthermore, this reasonable suspicion was transferred to Wilson upon his arrival at the scene, ... and O'Neill's instruction to return Garner to the traffic stop. As Wilson approached Garner on the sidewalk, he noted

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[1] For reasons not disclosed, the Court failed to tell us what crime the Court had in mind that officer O'Neill should have suspected Garner of. Indeed, it seems the Court somehow satisfied itself by elevating O'Neill's curiosity to a suspicion. The question then is, can they do that with impunity? Simply put, given that there was nothing in Garner's conduct which conveyed any indication of criminality or provided the basis for any type of police interference with Garner.

[2] It is most doubtful the dispatcher O'Neill was talking to even knew the owner of the vehicle was incarcerated. Also, it is most doubtful O'Neill learned of this fact while still on the street. In other words, it is doubtful the dispatcher could have learned the owner of the vehicle was in prison (if he ever learned this fact) before O'Neill told Wilson to bring Garner back.

> that he was visibly shaking. Garner initially failed to respond to the officer. Also, when asked what was in the bag, Garner voluntarily responded jewelry or drugs.

Opinion, Appendix "B," at pp. 15a-16a. (Emphasis supplied.)

Of monumental significance to the Appellate Court's Opinion is the reference made, in the above quote, to Wilson's testimonial version of his encounter with Frank Garner. Indeed, the Opinion credits officer Wilson with stating that Garner while "visibly shaking" volunteered that the bag he was carrying contained "jewelry or drugs" (*ibid*). According to the Court this statement is what justified the bag being searched.

Ignored by the Court, despite its significance being called to the Court's attention, is the fact that Wilson's testimony on this point was shown to be wilfully contrived. Indeed his testimony cannot survive any meaningful assessment of the Record. Our reference here is to officer Wilson's written police report, the contents of which were compellingly incorporated into the affidavit supporting, both, the original Complaint in this case and the various search warrants that were issued and executed.

Here the testimony provided by Detective Ross at the Suppression Hearing bearing on these critically important credibility issues was as follows:

> Q. ... And you were aware, then, that in the affidavit, paragraph 5, it stated Cleveland Police Officer Paul Wilson arrived at the request of Officer

O'Neill; stopped Frank Garner. *Also Wilson detained Garner, frisked him for possible weapons, patted down Garner*. And also determined the bag was heavy.

As Officer Wilson attempted to move the bag, he could feel individual blocks inside the bag, which he, in his training and experience, believed to be in the shape of several kilogram size packages of possible controlled substance.

Officer Wilson then opened the bag[3] and observed what appeared to be nine packages of cocaine individually wrapped in brown bags - - brown tape.

You read this [document], didn't you?

A. I briefly looked over it, yes, sir.

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[3] Absolutely nothing was said by officer Wilson (about Garner being nervous or having even mentioned drugs) in his police reports, or in his interview had with the detectives, that recited his official version of the arrest. These reports and his interview were relied on for issuance of the Complaint (charging Garner in this case), and for various search warrants that were issued. Simply put, nowhere was it written that officer Wilson had talked about Garner being noticeably nervous or about him saying drugs were in the bag *before* it was searched. The fact that these asserted statements, albeit disputed and left unresolved by the trial Judge, were central to the Court's decision makes for a matter of cardinal significance.

Q. And you were aware of its content?

A. Yes, sir.

Q. We will mark the [C]omplaint in this case, your Honor, Defendant's Exhibit B.

And I'll ask you, you were involved, were you not, sir, as the affiant in the obtaining of several search warrants in Cuyahoga County?

A. Yes, sir.

Q. *And the affidavit that's attached to these search warrants was prepared by you*?

A. *Yes, sir.*

Q. And *in those search warrants, a comparable statement about how Mr. Wilson came in contact with the cocaine likewise appears, doesn't it?*

A. *Yes, sir.*

(Tr., pp. 92-93.)[4] (Emphasis supplied.)

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[4] One thing at least is thus clear in all this, officer Wilson, either, lied in his police report (which was relied on by detective Ross as shown in this quoted testimony) or he lied in his testimony which the Courts below have actually sought to gospelize in

THE APPEAL

Still other critical issues here relate to the Court's rank, yet rote, adoption of the trial Court's ultimate conclusion that the search was lawful. Again, the Court's ultimate thesis was not relied on, or (for that matter) even commented on, by the trial Court - - to say nothing of having been addressed by either counsel. Here particular reference is made to the various conclusory findings distilled from the Opinion here being challenged. What is most significant in all this is the fact that the Court specifically *rejected* the government's contention that: Garner's exiting the vehicle and leaving the scene gave officer O'Neill, and through him, Wilson, the necessary probable cause to *arrest* Garner. (Appendix "A," 14a.) (Emphasis supplied.)

Likewise significant here, it is debatable whether all of the asserted data the Court credited officer O'Neill with being aware of, in the above quote, from their Opinion (*ante*, p. 5) was possessed by him *before* he directed his fellow officer to deliver petitioner back to the scene of the traffic stop investigation so the bag could be searched. Here, of course, one fact is clear: O'Neill says he wanted this done "because ... [he] was curious [about] what was in the bag" (*ante,* p. 4). Another further fact is likewise manifest. Officer Wilson's action in accosting Frank Garner, and causing his submission to the officer's authority must be viewed as at least a seizure, if not an arrest. Indeed even the Court of Appeals recognized it was after officer O'Neill told petitioner he could leave, that officer Wilson arrived at the scene of the traffic stop (*ante*, p.

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reaching conflicting and irreconcilable conclusions as to when the arrest occurred and for what crime.

5). According to the Opinion, he was told "to return Garner to the traffic stop" (*ibid*). Also the Court further noted:

> When asked at the trial why he questioned Garner about what was in the bag [officer Wilson] responded "I check everybody's bag, purse, that sits behind me...."

Appendix. "B", p. 6a.

What the Court ignored, in its flawed ratiocinations, is that a stop, a seizure or an arrest, is good or bad when made. The upshot of the point here being relied on is that nothing petitioner said *after* he submitted to the officer's commands can be used to validate any of the officer's initial actions, which were punctuated by Garner being compelled to submit to his show of police authority. Of no mean significance here the District Court, in describing the Wilson-Garner confrontation, did so in a way that shows what he regarded as the critical facts. Specifically it was then said:

> Officer Wilson caught up with Garner and told him he needed to return to officer O'Neill's location .... Officer Wilson planned to drive back to officer O'Neill's location in his zone car. Officer Wilson again told Garner that he would have to return with him and then asked him what was in the bag.

United States v. Garner, 108 F. Supp. 796, at 799. As argued below, once Wilson told "Garner ... he needed to return" to where officer O'Neill was and also told him that "he would have to return with him" (*ibid*), an arrest for which probable cause was required occurred.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

Critical aspects of the arguments made below emphasize what seems clearly to be a dispositive tenet here, *i.e.*, that only when an officer "had probable cause to search a car [may he] inspect passenger belongings found in the car that are capable of concealing the object of the search," *Wyoming v. Houghton*, 526 U.S. 295, at 307 (1999). Distilled, it is contended that, given the lack of probable cause to search, either, the interior of the vehicle or the personal property of the non-driver at the point he was allowed to exit the vehicle (and became a pedestrian), it follows that these officers lacked any basis whatsoever for interfering with our petitioner in any way.

Indeed, as we read *Brown v. Texas*, 443 U.S. 47 (1979), what was said then is even more compelling today. There it was said that: "none of the circumstances preceding the detention of appellant justified a reasonable suspicion that he was involved in criminal conduct." (*Id.*, pp. 51-52.) Having said that the Court went on to hold that: "in the absence of any basis for suspecting [petitioner] of misconduct, the balance between the public interest and [petitioner's] right to personal security and privacy tilts in favor of freedom from police interference." (*Id.*, p. 53.) The point, of course, being that given the lack of any justification the law is as clear here as it was when this Court wrote in *Florida v Royer*, 460 U.S. 491 (1983), that "a citizen may not be detained even momentarily without reasonable, objective grounds for doing so" (*id.*, at 498).

In this case then there is simply no way it can be said that officer O'Neill, assuming he was an "objectively reasonable police officer," *Ornelas v. United States*, 517 U.S.

690, at 696 (1996), could infer from his curiosity about what was in the bag Frank Garner (who by then was a pedestrian) had with him, there was a "fair probability" it contained evidence of illegal activity. On the other hand, even on this narrow point it should be understood officer O'Neill never testified he was *suspicious* as to what was in the bag. He only said he was *curious*. One, of course, does not have to be a semanticist to realize there is no compatibility between being suspicious and being curious. On the other hand, being both suspicious and curious about the contents of a bag does not translate into probable cause to search the bag. It really is that simple.

Here too it is significant that the facts in this case, but for the narrow ruling by the Sixth Circuit (that fully agreed with counsel) would have squarely raised the issue this Court concluded was not presented by the facts in *Maryland v. Wilson*, 519 U.S. 408 (1997). On the other hand, other equally critical issues actually surface in our case. As the discussions made herein show the intervention of this Court is surely required to reject some of the truly flawed notions argued by the government and accepted by the Court below -- a conclusion that was reached without regard, in some instances, to the facts or the law.

These issues are backgrounded by facts which show the officer's express direction to the passenger (our petitioner) that he could leave the scene of the traffic stop, that was still being investigated. The contention is made that his right to proceed on his way could not possibly be deemed to have been diluted by the officer's claim of a belated awareness that petitioner was carrying with him a duffle-like bag -- his bag. This follows, in our judgment, for at least two very compelling reasons. The first of these relates to the fact that petitioner surely had the right to walk away from a situation

that did not in any way involve him. The other is: he certainly could take personal property with him. With this being so, supposedly the officer's later realization petitioner was carrying a bag with him when he left would in any event be a fact that is truly inconsequential.

Here we contend the law is clear that no right to search this bag existed when the bag was removed from the vehicle. Indeed, given the fact that the driver had not been arrested, indeed was only being subjected to a traffic stop, nothing could be any clearer than the conclusion that petitioner's departure with the bag lessened any safety concerns, whether real or imagined, the officer may otherwise have had.

The most significant fact that surfaces in the wake of the absence of "probable cause" to seize Frank Garner before he exited the car, or even after he exited the car, applied to his possessions as well. The fact that we have not yet been told why this is not so makes for an issue that really should be resolved at this level. Of significance here will be counsel-opposite's efforts to deal with the absolute fact that before officer Wilson compelled Frank Garner to stop, the things officer O'Neill (who directed him) had observed did not amount to grounds for a reasonable suspicion of wrongdoing. Indeed, Frank Garner's walking down the street carrying a duffle-like bag was not an act that was suggestive of any crime sufficient to constitute any reasonable suspicion.

ARGUMENT NO. I

Where a police officer, while investigating a routine traffic stop, expressly authorizes the passenger to exit the vehicle and depart the area, can this officer later empower a fellow officer (who subsequently arrives on the scene) to retrieve and return the passenger (now a pedestrian) to the scene because the officer was simply curious about what was in a duffle-like bag he was carrying.

For starters it seem clear enough that *prior* to the actual arrest[5] of the driver, Lindira Hubbard (who was also the co-defendant), this officer lacked any constitutional basis for searching the vehicle from which petitioner had exited. Clearly no basis existed to make a search of the interior of this vehicle prior to Hubbard's arrest. Indeed, unless *Wyoming v. Houghton*, 526 U.S. 295 (1999) and *Michigan v. Long*, 463 U.S. 1032 (1983), are being misread, these cases make the point that a warrantless search of a vehicle in these circumstances (*i.e.*, where there was no probable cause to arrest) is only proper when conducted to protect the officer's safety. Clearly the officer's safety was not at risk from Garner as he *walked* down the street and was some distance

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[5] For what it is worth, the arrest of Hubbard was shown to have occurred, as the District Court found, after Wilson returned Garner to where O'Neill was investigating the traffic stop. If, as put by the District Court, O'Neill and Wilson arrested Hubbard after Frank Garner was arrested for the drugs found in the bag and this was done because of the Garner arrest, it could not be any clearer the right to search the vehicle did not arise until the Hubbard arrest occurred.. *United States v. Garner*, 108 F. Supp. 796, at 799 (2000).

away. With this being so, it is apparent the 'officer's safety' cliche cannot be relied on.

What makes this Court's decision in *Wyoming v. Houghton*, 526 U.S. 295 (1999) most significant in this case is that the ruling there requires only when an officer has "probable cause to search a car [may he] inspect [a] passenger's belongings found in the car that are capable of concealing the object of the search" (*id.*, p. 307). With this being so it is most telling that in seeking to have Frank Garner brought back the officer was clearly bent on searching the bag for evidence of a crime that was independent of the traffic investigation that was underway.

Another point here to be considered shows that even Hornbook law it says seizure for Fourth Amendment purposes occurs whenever the person accosted would not have felt free "to disregard the police and go on about his business," *California v. Hodari D*, 499 U.S. 621, at 628 (1991). Obviously from the point when the officer interrupted petitioner's walk down the street it was made clear to our petitioner he was not free to go on about his way.

A critical point here that seems clearly to have been missed by the Court of Appeals in its articulation of what it regarded as justification for these officers not allowing petitioner to go on about his business is that Court failed to recognize several important considerations. Indeed, nowhere in officer O'Neill's testimony does he tell us anything that would even infer a reasonable suspicion for a belief criminal activity involving Garner was afoot. On the other hand, it is clear he wanted to search Frank Garner's bag. And this he wanted to do to satisfy his own curiosity as to what was in it.

However, we do know that even if O'Neill was aware (before the fact) of all the things the Court attributes to him, these factors would not make for probable cause to search. Having said that, it should be noted in our judgment the Sixth Circuit has conflated separate and distinct Fourth Amendment inquiries that need to be separately reckoned with here. First off, the question as to whether there was probable cause to arrest Frank Garner, we submit that clearly it *did not* exist. The same is true as to whether, even based on the facts attributed to officer O'Neill by the Sixth Circuit (as known by him when he told Wilson to bring Frank Garner back).

What emerges from the above reference to the Record and to the conflicting assessments of the "facts," made by the District Court, the Sixth Circuit, and the respective counsel, is one clear fact. Officer O'Neill's curiosity about the contents of the bag Garner was carrying cannot supplant the need there was for a probable cause basis to act on this curiosity. With this being so, what is exposed is the fact that O'Neill *was not* motivated by anything other than a desire to search. And this despite the fact that he lacked probable cause to do so. Here we are reminded of the sagacious observation made in *Arizona v. Hicks*, 480 U.S. 321 (1987). There it was said:

> "There is nothing new in the realization that the constitution sometimes insulates the criminality of a few in order to protect the privacy of all."

Id., p. 329.

Even more important, we are yet to be told what "criminal activity" (imputed or otherwise) it can be said O'Neill "reasonably suspected" Frank Garner to have been

engaged in. If nothing else, the one thing we do know is that O'Neill never testified to any such suspicion. The cogency of our incontrovertible thesis is further buttressed by O'Neill's testimony (as shown above [*ante*, p. 4]) that he was merely *curious* as to what was in the bag Garner was seen carrying. According to O'Neill, it was this curiosity that caused him to tell officer Wilson to bring Garner back[6] (Tr., pp. 42-43). This compellingly persuasive fact is augmented by Wilson's testimony that he had no reasons of his own for stopping Frank Garner (*id.*, p. 58).

Postured by these facts, the bottom line is absolutely nothing was written in any of the Opinions written in the Courts below that can be said to have been relied on as providing a "founded suspicion" for any stop. Indeed, rather than show us O'Neill was able to "point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warranted the intrusion" (*Terry v. Ohio*, 392 U.S. 1 at 21 [1968]), the panel simply imputed to O'Neill what it would have regarded as being a sufficient basis for the stop (had O'Neill thought of it). While this is bad enough, the panel then actually proceeded to act as though such was in fact the basis for the actions taken by officer Wilson. Having made this quantum leap, the panel then arbitrarily concluded it had the power to determine it was enough to simply say a *Terry* stop occurred and suppose that should end the matter.

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[6] In other words, it should be understood that O'Neill *did not* say he suspected Garner was then and there involved in any sort of "criminal activity". Rather, at the risk of sounding repetitious, O'Neill simply told us he was curious as to what was in the bag and for that reason he wanted him brought back to the scene of the traffic stop.

On the other hand, it is worth noting that while the appellate Court would read into, *and out of*, what it regarded as an acceptable version of the testimony of competing versions, one cannot ignore the rendition provided us by the District Court[7] (*ante*, p. 9.) The critical point being when "Officer Wilson caught up to Garner and told him that he needed to return to Officer O'Neill's location" an arrest occurred. *Dunaway v. New York*, 422 U.S. 207 (1979).

ARGUMENT NO. II

Where a police officer testifies to facts that show he made a seizure (or arrest, as the case may be) of a pedestrian solely because he was asked to do so, any question as to the constitutional basis for the encounter turns on whether the officer who requested the action could have taken the identical action himself.

Here it is clear, officer O'Neill stopped the vehicle in which Frank Garner was a mere passenger because the vehicle lacked a front license plate. Garner was *ultimately* allowed to leave the scene. Despite this indisputable fact, when officer O'Neill was joined by another officer, he asked that officer to bring Garner, who by then was a pedestrian, back. His stated reason for making this request, which was not even communicated to this second officer, was that he was merely

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[7] Here it is worth noting that while the Court's assessment of Wilson's testimony is sufficiently accurate, in crediting Wilson's testimony, it should be understood Wilson's testimony cannot be reconciled with his original version of his encounter with Garner. The reference here is to Wilson's formal police report, which was quoted for the Court. (*Ante*, pp. 6-8.)

curious as to what was in the duffle-type bag Garner was carrying. Indeed, officer O'Neill so testified (Tr., pp. 42-43). The point being, of course, that once the panel rejected the trial Court's thesis, then clearly the showing that officer Wilson (the officer asked to seize Garner and who in fact did so) admitted he lacked any reasons of his own for making the stop becomes a matter of critical significance (*id.*, pp. 69-71). This follows because it could not be any clearer that there was nothing in whatever information officer O'Neill possessed that could even arguably be imputed to Wilson and would have enabled him to make the identical seizure made by Wilson. Because this is so, it follows this arrest cannot survive meaningful scrutiny.

With the above cogent analysis being unassailable, its significance becomes overwhelming since Officer O'Neill must be credited with knowledge of two very crucial facts when he told his brother officer, Wilson, to bring Garner back. First, O'Neill had to know that because he had not *arrested* the driver, this makes it clear that when he told Wilson to collect Garner he lacked probable cause even then to search the vehicle, the driver or anything inside the vehicle. Assuming the officer had any unexpressed fears for his safety, surely he would have, early on, under concepts that distill from *Pennsylvania v. Mimms*, 443 U.S. 106 (1977) and *Maryland v. Wilson*, 519 U.S. 408 (1997), augmented by principles that are extractable from *Michigan v. Long*, 463 U.S. 1032 (1983), *New York v. Belton*, 453 U.S. 454 (1981), and *Wyoming v. Houghton*, 526 U.S. 295 (1999), asked the driver and the passenger to exit the vehicle for his safety. With this being so, *once* Frank Garner, the passenger, exited the vehicle and walked away, he became a pedestrian. So postured, both he and his bag were impervious to being searched. This follows *unless* the government was able to prove its seizure or Garner's detention, arrest and search fell

within one of the exceptions to the warrant requirements of the Fourth Amendment.

Given the following segment of officer O'Neill's testimony, the inexorable conclusion required here becomes manifest. Here the officer testified:

> Q. ... When [officer Wilson] came upon the scene you told him to get the gentleman walking down the street, correct?
>
> A. I told him to bring him back here.
>
> Q. *Why did you tell him to bring him back?*
>
> A. *Because he took off after I told him three times to stay in the vehicle.*
>
> Q. *You told all that to Mr. Wilson?*
>
> A. *No I did not say that to Mr. Wilson ....*
>
> Q. As a matter of fact, what you told Mr. Wilson - - and *I am looking at your report* ... you told Mr. Wilson that you suspected the male was trying to hide something, correct?
>
> A. That's correct.

Tr., p. 42. (Emphasis supplied.)

Of course, it could not be any clearer that officer O'Neill was dealing with what he knew at the time was only minor traffic offenses involving the driver. And, he further knew such offenses are not the type for which physical evidence could be searched for. With this being so, it follows that officer O'Neill had to be aware he did not have any reason to connect Frank Garner in any way to the traffic offenses he was investigating. Simply put then, what he sought by his directions to officer Wilson was to undertake an investigation for a totally different and independent offense. In so doing, clearly he was acting on his own authority. This seems clear enough. Thus, the fact that he lacked probable cause to seize Frank Garner when he was seized could not be any clearer.

ARGUMENT NO. III

When a reviewing court *rejects* the district court's opinions that a valid arrest for a specific crime had occurred and that the contraband was lawfully seized incident to that arrest, can the reviewing court avoid reversing the conviction by making a factual finding on a disputed issue that was left unresolved[8] by the trial judge.

Now it has long been the law that an arrest cannot be justified by the search and then the search justified by the arrest. With this being so, it is significant here that the facts clearly show officer O'Neill (who the Appellate Court credited with having a *reasonable suspicion* sufficient to justify a stop) actually lacked the required "particularized and objective basis" for suspecting Frank Garner of any wrongdoing.

Here too it should be noted the Court seems clearly to have overstated what it claims officer Wilson knew about the circumstances when he told officer Wilson to collect Garner, who was walking down the street. Indeed, if nothing else, we

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[8] The point here was well made by Justice Cardozo, a sage from a bygone but enlightened era. Reference here is to what he once wrote in an analogous connection. There it was said: "a trial becomes unfair if testimony thus accepted [here, interpreted] may be used in an appellate court although admitted for a different purpose, unavowed and unsuspected." *Shepard v. United States*, 290 U.S. 96, at 103 (1933). Here, of course, the government sought to prove, and did prove, to the District Court, that Frank Garner violated a order given him by officer Wilson and this fact created the offense for which he was arrested.

know from O'Neill's testimony that he did not tell Wilson he had given Garner permission to leave and why he wanted him brought back. Indeed, even in the Appellate Court's *ad hoc* rationale (Appendix "A," Opinion, p. 16a), no reference is made to why O'Neill wanted Garner brought back. Also, it is likewise clear Wilson was acting on the sole basis that he had been told by a fellow officer to bring Garner back to the scene of the traffic offense. Indeed, officer Wilson concedes that at the inception of his encounter with Garner it was made clear to him he was taking Garner back. *Obviously Wilson had to know that he was making an arrest*. See *Dunaway v. New York*, 439 U.S. 979 (1982).

The law is likewise clear that Fourth Amendment issues regarding the lawfulness of any stop, seizure or arrest generally presents a mixed question of law and fact. In this regard, findings of fact made at a suppression hearing are routinely upheld *unless* they are clearly erroneous. Also, it is likewise clear that a review of the trial Court's decision denying a Motion to Suppress, the case here, is reviewed *de novo*. See *Ornelas v. United States*, 517 U.S. 690 (1926). With this being so, there is one inviolate tenet that must be reckoned with. It holds that even a *Terry* stop if based on hunches (or curiosity, the case here) cannot withstand constitutional scrutiny.

Now, we do recognize that effective law enforcement is often predicated on "hunches," even those that are curiosity-based. This is especially so when the hunch or the curiosity is distilled from an officer's years of experience. Because this is so, the law requires that before the officer arrogates to himself the power to stop a pedestrian he must be able, "to point to specific and articulable facts which ... warrant the intrusion." *Terry v. Ohio*, 392 U.S. 1, at 21 (1968).

Indeed, and this is most critical, what the trial Court inferentially held was that officer Wilson acted on the basis of information known by him. And that this is so despite Wilson's categorical testimony that he had no reasons of his own to even "stop" Garner, as he did (Tr., pp. 69-71). Wilson's testimony that he did not have any basis of his own to have an encounter with Garner (who he actually passed on the street en route to the site of the traffic stop [*ibid*]) is likewise a fact worthy of being considered. Despite this testimony it was said:

> ... Officer Wilson had reasonable grounds for detaining Defendant Garner. From his conversation with Officer O'Neill, *Wilson knew that Garner had already fled the scene of the traffic stop.*[9] And as he approached Garner, Wilson observed Garner visibly shaking.

United States v. Garner, 108 F. Supp. 796, at 801 (N.D. Ohio, 2000).

What makes the above quote so compelling is that the factual determinations there made formed the fulcrum of the District Court's summary disposition of our Motion to Suppress. This reality is thus consequentially significant. This follows because the Appellate Court's decision in first

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[9] Obviously officer Wilson was being credited with being clairvoyant. This follows (despite the flawed premise relied on by the Court)since O'Neill specifically and categorically testified he did not tell Wilson why he wanted petitioner brought back. Indeed, when specifically asked if he told Wilson Frank Garner had left the scene although told not to do so, his categorical answer was "I did not say that to Mr. Wilson" (*ante*, p. 20).

adopting a reasonable suspicion theory, and then imputing it to officer Wilson, constitutes more than a total rejection of the District Court's primary thesis.

Indeed, as the District Court saw it: Wilson had *probable cause* at the onset of his encounter with Garner. Specifically, as the District Court put it, "Wilson had *probable cause to arrest*[10] Garner because he failed to comply with a lawful police order" (*id.*, p. 800). (Emphasis supplied.) On the other hand, the Appellate Court has determined it was O'Neill (independent of Wilson) who "had reasonable suspicion to stop Garner"(*ante*, p. 5), which that Court reasoned was imputed to Wilson. And, according to the Opinion, it was because this "reasonable suspicion" was assertedly present, the search of the duffel bag was incident to what it regarded as *probable cause* to arrest that was acquired after the stop. Obviously the Court proceeded as though *Smith v. Ohio*, 494 U.S. 541 (1990), and those cases that hold you cannot justify an arrest by the search and then justify the search by the arrest, had no application here.

Thus it is significant, all the moreso, because the Appellate Court's resolution theory was not raised in the Court below by the government. Indeed if the probable cause rationale adopted by the Court had been raised for the first time during the appeal (by either party), the conclusion that the contention had been waived would be the determination

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[10] With the determination by the District Court that an arrest occurred at the outset of Wilson's encounter with Frank Garner, it required more than a quantum leap for the Court of Appeals to not only avoid saying this arrest was illegal, but to reach the spectacular conclusion that what really happened here was Wilson, while acting on the basis of asserted facts known to officer O'Neill, had only made a *Terry*-stop.

made by this Court. If not that, then surely the trial Court would, somewhere in its Opinion, have let it be known that he had considered and rejected Detective Ross' testimony as to the contents of Wilson's police report of his involvement in this episode. The report showed Wilson's original version of Garner's arrest cannot be reconciled with his testimony. (See, *ante*, pp. 6-8.) Stated another way, it is most significant here that the trial Court did not make a factual finding that rejected Detective Ross's testimony and affidavit which was based on the police reports filed by officer Wilson. Yet, the Appellate Court, arguably for obvious reasons, resolved this undeniably disputed factual issue against the petitioner. What this does is make for a situation where we have an appellate decision resolving critical disputed factual issues in favor of the government *and* then using the resolution thus made as a major premise in its dispositive resolution of a fourth amendment issue.

CONCLUSION

Even assuming that (contrary to our contentions) Garner *was not* seized (or arrested) at the point of his initial encounter with Wilson, given the panel's statement that the original "stop" made by officer Wilson was based on O'Neill's asserted awareness of certain facts,[11] it is at once obvious the Appellate Court fully discounted Garner's *denial*

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[11] On the narrow point as to what O'Neill was aware of when he spoke to officer Wilson, one cannot say at what point in the time frame involved (*i.e.*, whether it was before or after he talked to Wilson) the entirety of the information the Court says officer O'Neill possessed was acquired. If nothing else a good question still exists as to whether anyone could have passed some of the information recited in the quote from the Opinion (*ante*, pp. 5-6) while Wilson was still on the street.

that he told Wilson there were drugs in the bag (Tr., pp. 135 & 142). The Court rejected Detective Ross's testimony as to how officer Wilson described the confrontation in his police reports (*ante*, pp. 6-8). Simply put, a factual question existed as to whether Wilson was "testilying".[12] Here it is worth repeating: police in Cleveland are no different than those in Los Angeles, Chicago, Detroit, Pittsburgh, Boston and New York. Indeed there are those of us who truly believe the Cleveland Police Department fully deserves its reputation for artificially filling in evidentiary gaps in search cases. See, *e.g.*, *United States v. Alexander*, 740 F. Supp. 437 (N.D. Ohio 1990); *State v. Dodson*, 43 Ohio App. 2d 31 (1974); *State v. Hunt*, 22 Ohio App. 3d 43 (1984); *State v. Gales*, 143 Ohio App. 3d 55 (2001) and *State v. Washington*, 144 Ohio App. 3d 482 (8th Dist., 2001).

The factual dispute referred to above (*ante*, p. 6 and n. 3) most assuredly should have qualified this case for *en banc* consideration. This follows because in the wake of the panel's decision (for the entire Court) that even when the stated basis for the denial of a Motion To Suppress is fully rejected, a reviewing panel may nonetheless affirm the denial even if it requires the panel to settle factual disputes that were not resolved, or even addressed, by the Court or the parties. What clarifies and magnifies the issue here is the fact that the government has fully contended throughout this case that officer Wilson made an *arrest* based on probable cause. Yet, the panel has not only conjured up a convoluted and false factual basis for its actions, it then proceeded to justify the

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[12] See, Mark Curriden, "*Secret Threat To Justice,*" National Law Journal 1, 29 (February 20, 1995) and Zuckoff, et al., "*Testilying Reporting Plan Set Up,*" Boston Globe (December 27, 1997).

search on the basis of the factual finding that Garner had (despite his denial)said there were drugs in the bag and thus his arrest was justified. The problem with this is the District Court *never* made the factual determinations relied on.

What emphasizes the concern here flows from the indelible fact that, in his affidavit for various search warrants, Detective Ross precisely described Wilson's encounter as was outlined in Wilson's official, written, report of the event itself (see *ante*, pp. 6-8). The testimony here referred to truly accentuates the flaws in the panel's conclusion on the basis of which it concluded Officer Wilson's actions were justified. Now it is not clear what possessed the panel to believe that even if the stop could be properly made, Wilson would also be vested with the power to take Garner back to the scene of the traffic stop then under investigation by O'Neill. Clearly *Terry* does not establish a basis for any of the actions taken here that so clearly intruded on Garner's fourth amendment rights.

What seemingly was not reckoned with by the panel, which held that Wilson actually had *probable cause* when Frank Garner was actually arrested, is the glaring fact that probable cause requires far more information than was available to either O'Neill or Wilson. This precise point is truly critical here because, if nothing else, Frank Garner was at least seized for Fourth Amendment purposes. This certainly occurred when officer Wilson made it so very clear to Garner that "he would have to return to officer O'Neill's location" and when Wilson *also* told petitioner: "he would have to return with him" and then asked "what was in the bag" (*ante*, p. 10).

Another reference to *United States v. Shepard*, cited above, is especially apt here. There in dealing with testimony

offered to prove a dying declaration, the Court rejected its use as proof of the decedent's state of mind. As Cardozo saw it "the testimony was neither offered or received for the strained and narrow purpose now suggested as legitimate" (*Shepard*, at 103). So in this case, we have the government contending, on the basis of its evidence, that a lawful arrest of Frank Garner was facilitated by officer Wilson, who had been directed to do so by officer O'Neill. On appeal, without any input on the issue by the litigants, the Court suddenly, and without notice, ruled this evidence could have been relied on to prove that only a *Terry*-stop had occurred. And that events which occurred thereafter created probable cause for the arrest that was made.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 00-4395

[Filed November 13, 2002]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
FRANK J. GARNER, JR., Defendant-Appellant.	)

ORDER

JUDGES:
Before DAUGHTREY and CLAY, Circuit Judges; and WILLIAMS,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. Glen M. Williams, Senior United States District Judge for the Western District of Virginia, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 00-4395, 00-4409

[Filed September 5, 2002]

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)
v.	)
FRANK J. GARNER and LINDIRA M. HUBBARD, Defendants-Appellants	)

On Appeal from the United States District Court
for the Northern District of Ohio
00-00262
Gwin. 10-20-00, 10-27-00

JUDGES:
BEFORE: DAUGHTREY and CLAY, Circuit Judges; and WILLIAMS, Senior District Judge.*

* The Hon. Glen M. Williams, Senior United States District Judge for the Western District of Virginia, Abingdon Division, sitting by designation.

OPINION

WILLIAMS, Senior District Judge. Lindira M. Hubbard ("Hubbard") appeals from his conviction for possession with intent to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2 and for the use and carrying of a firearm during a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1). Frank J. Garner ("Garner") appeals from his guilty plea to a charge of possession with intent to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2. Hubbard and Garner raise a number of challenges to their convictions and sentences. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

The convictions of Hubbard and Garner stem from events occurring on May 16, 2000. Cleveland Police Officer Joseph O'Neill ("O'Neill"), a motorcycle patrolman, pulled over a 1998 Ford Expedition lacking a front license plate at approximately 11:50 a.m. (J.A. at 354-55.) Hubbard was the driver, and Garner was in the passenger seat. (J.A. at 356.) After stopping the vehicle, O'Neill approached the driver and asked for his driver's license. (J.A. at 357.) Hubbard responded that he did not have a driver's license, that the vehicle belonged to Khaleel Haqq, that he was taking Garner to work, and that there was possibly a warrant for his (Hubbard's) arrest. (J.A. at 357.) Thereafter, O'Neill took Hubbard's name and social security number down and returned to his motorcycle to run the vehicle plates and the driver's information. (J.A. at 358.)

The dispatcher informed O'Neill that the vehicle belonged to Sylvester Harris, who was currently incarcerated, that Hubbard did not have a valid driver's license, and that he had no outstanding warrants. (J.A. at 358.) At this point, O'Neill requested that backup be sent to assist him. (J.A. at 358-59.) O'Neill testified at Hubbard's hearing on his motion to suppress that he asked the vehicle occupants to remain in the vehicle while he checked on the information he had received. While O'Neill was on the radio, Hubbard stated that Garner needed to go to work. O'Neill told him to wait, that "it [would] only be a few more minutes." (J.A. at 232.) Hubbard began honking his horn to get the officer's attention and again requested that Garner be allowed to go to work. (J.A. at 233.) Garner attempted to get out of the car, and O'Neill told him to wait in the car for a few more minutes. (J.A. at 233.) Garner again opened his door, looked back at O'Neill and stated that he needed to go to work, and, again, O'Neill told him to wait. Garner persisted, and O'Neill testified that rather than risk a confrontation, he told Garner to go ahead and leave. (J.A. at 234.) O'Neill gave similar testimony at trial, stating, "Then the passenger got out of the car again, and I'm by myself, behind the vehicle, and I just told them, that's fine. Just go." (J.A. at 359.) At this point, Garner exited the vehicle, grabbed a black gym bag and began to walk down the street. (J.A. at 234, 359.)

Hubbard's and Garner's versions of these events differ somewhat from the government's version. According to Hubbard, once O'Neill returned from running the personal information and plates, Garner asked if he could get out and go to work, and O'Neill responded, "Go ahead." (J.A. at 286.) Garner's testimony was essentially the same. (J.A. at 294.)

Shortly thereafter, Cleveland Police Officer Paul Wilson ("Wilson") arrived to assist O'Neill. O'Neill told Wilson to go stop Garner and return him to the scene of the traffic stop. (J.A. at 360, 365.) Wilson pulled his police car alongside Garner, who was approximately 200 feet from the scene of the traffic stop, exited the vehicle and walked up to Garner. (J.A. at 366-67.) Garner was still carrying the black gym bag and, according to Wilson, visibly shaking. (J.A. at 367.) Wilson identified himself and informed Garner that O'Neill wanted him back at the traffic stop. Garner did not respond. (J.A. at 367.) Again Wilson asked Garner to return to the traffic stop with him, and also asked him what was in the bag. (J.A. at 367.) When asked at trial why he questioned Garner about what was in the bag, Wilson responded, "I check everybody's bag, purse, that sits behind me, so I know for their safety and my safety. And plus I want to arrive home to my family. I wouldn't want to be shot in the back or nothing." (J.A. at 367-68.)

Garner responded to the question that he had found the bag along the railroad tracks and that the bag contained jewelry or drugs. (J.A. at 368.) Wilson then grabbed Garner with his left hand around Garner's right bicep, escorted him to the car and opened the rear passenger door where Garner sat down with his feet on the sidewalk. Wilson then took the bag and stated, "Let's open this bag and see what's in it." (J.A. at 267, 368.) Garner made no response. (J.A. at 369.) Wilson unzipped the bag in front of Garner, and both looked in the bag. There, Wilson observed seven bags vacuum-wrapped in brown packaging tape that appeared to be drug packages. Wilson advised Garner that he was under arrest at that time and not to speak to him. (J.A. at 368-69.) Wilson placed Garner in the rear of the car without handcuffing him,

placed the bag in the front passenger floorboard of the car and returned to the scene of the traffic stop. (J.A. at 369.)

At the suppression hearing, Garner's explanation differed from that of Officer Wilson. According to Garner, he found the bag alongside the railroad tracks. He stated that he did not know the bag contained drugs. (J.A. at 303.) Garner stated that a few days prior to this incident, he was riding with Detective Johnson of the East Cleveland Police Department when they came across a Jamaican who said he had been robbed of a bag fitting the description of the bag Garner found. (J.A. at 304.) Detective Johnson reportedly told Garner that if he found the bag, to let him know. (J.A. at 304.) Garner stated that he was on his way to see a lawn care client and intended to call Johnson from there. (J.A. at 304-05.)

Wilson informed O'Neill of what he had found. The two officers then decided to approach the vehicle. (J.A. at 370.) Because of the drug discovery, the officers drew their sidearms. (J.A. at 361-62, 370.) Wilson approached the driver's side of the vehicle, and O'Neill approached from the passenger's side. (J.A. at 361, 370.) Wilson opened the door to the car, asked Hubbard to step out and face the truck and get on his knees. (J.A. at 370.) O'Neill came around from the other side. Hubbard stated that he was carrying a gun on his right hip. (J.A. at 362-63, 371, 398.) O'Neill removed a loaded Star .45-caliber semi-automatic handgun and extra loaded magazine from a black nylon belt designed to secure a weapon underneath a person's pants. (J.A. at 363.)

At this point, other officers arrived at the scene. Garner and Hubbard were advised of their constitutional

rights and placed under arrest. (J.A. at 273-74.) Detective Ronald Ross ("Ross") of the Caribbean Gang Drug Task Force arrived and searched the truck where he found mail addressed to Khaleel Haqq. (J.A. at 375.) Garner and Hubbard were transported to Sixth District Police Department for further processing. (J.A. at 373.) At the police station, O'Neill issued a ticket to Hubbard for failure to display a front license plate, not wearing a seat belt and driving without a valid license. (J.A. at 243.) He issued a ticket to Garner for failure to wear a seatbelt. (J.A. at 244.)

While at the station, Garner and Hubbard were again advised of their constitutional rights and interviewed. (J.A. at 280-81.) Garner waived his rights and agreed to make a statement to Ross and Detective Thomas Williams. (J.A. at 90.) Ross testified that Garner stated in that interview that he was walking by the railroad tracks and found the black duffel bag. (J.A. at 281.) Garner stated that he looked inside the bag and thought it contained either drugs or money. (J.A. at 281.) He then continued walking, carrying the bag with him, to St. Clair Avenue where he got a ride with Hubbard. (J.A. at 281.) According to Ross, Garner initially stated that they were on their way to a scrap yard, then changed his story, stating that he and Hubbard were going to the East Cleveland Police Department to turn the bag over to a Detective Brown. (J.A. at 281.) When asked why they were traveling away from the police station, Garner could not provide an explanation and ended the interview. (J.A. at 281-83.) Williams testified that the interview lasted approximately 25 minutes and that Garner never asked for a lawyer. (J.A. at 94-95.) At his suppression hearing, Garner testified that he was interviewed by six people. (J.A. at 312.) He further

stated that he twice requested a lawyer and made no statement whatsoever. (J.A. at 312-315.)

Hubbard likewise waived his rights and made a statement to Detectives Mike Gray and Ron James in an interview that began between 5:15 p.m. and 5:30 p.m. and lasted approximately two hours. (J.A. at 334.) According to James, Hubbard initially denied any knowledge of Garner or the contents of the bag, but after the detectives stated that they did not believe him and gave Hubbard certain assurances that his street reputation would not be harmed, Hubbard became more cooperative. (J.A. at 379-80.) According to James, Hubbard stated that he was the "number-two man" in a much larger drug trafficking organization that included Khaleel Haqq ("Haqq"), Kent Harris, Leamon Eddie ("Eddie"), also known as "Buddha," and others. Hubbard identified himself as the "enforcer" because of his large physical size and further identified Haqq as the leader of the group. (J.A. at 380-81.) Hubbard stated he had received instructions to pick up Garner with the cocaine. Together, they met Kent Harris and gave him five kilograms of cocaine. They then were on their way to meet another man to distribute six kilograms of cocaine when they were stopped by the police. (J.A. at 382-83.)

At his suppression hearing, Hubbard denied making any statement to anyone of the sort detailed above. (J.A. at 337.) He admitted knowing Kent Harris and Haqq, but denied any knowledge of drug dealing. (J.A. at 337.) Hubbard did acknowledge that both he and Garner were advised of their constitutional rights both at the scene of the traffic stop and at the police station. (J.A. at 337.) The court determined that Hubbard was not coerced in any manner and concluded that

the statement made by him should not be suppressed. (J.A. at 339-40.)

On June 14, 2000, a grand jury indicted Hubbard and Garner for possession with intent to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § § 841(a)(1) and (b)(1)(A) and 18 U.S.C. § 2 ("Count One"). (J.A. at 23.) Hubbard also was indicted for the use and carrying of a firearm during a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1). Garner pled guilty to the charges against him, (J.A. at 181-88), but Hubbard pled not guilty and proceeded to trial. (J.A. at 60-61.)

Garner moved to suppress the evidence seized and the statements made during his encounter with Wilson as well as the statements made during his subsequent detention. (J.A. at 71-78.) The court denied this motion on July 19, 2000. (J.A. at 163-72.) It determined that Wilson had probable cause to arrest "because [Garner] failed to comply with a lawful police order." (J.A. at 167.) The court also justified Garner's detention under the auspices of a *Terry* stop, *see Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868, 44 Ohio Op. 2d 383 (1968), finding that Wilson had reasonable suspicion sufficient to detain Garner. (J.A. at 168-69.) Regarding the search of Garner's duffel bag, the court determined that the search was permissible as either a search incident to an arrest, (J.A. at 169), or, if the detention of Garner was viewed as less than a full custodial arrest, as a protective search under *Terry* and its progeny. (J.A. at 170-71.) Finally, the court determined that Garner's statements made while in detention were admissible. The court found that Garner's testimony at the hearing was "implausible" and "self-serving." (J.A. at 172.) The court, therefore, credited

the testimony of the officers as being much more credible and allowed the evidence to be presented. (J.A. at 172.)

Following Garner's motion for reconsideration, (J.A. at 194-201), the district court further clarified its previous position. Garner sought to focus the court's attention on O'Neill's release of Garner from the vehicle. The court discounted this fact, however, stating that "Garner fails to realize that Officer O'Neill's approval did not inoculate him from liability for his earlier refusal to comply with O'Neill's order to remain in the vehicle." (J.A. at 217.) The court also reiterated its previous reasoning that even if it had erred in finding probable cause, Wilson was still justified in his search under *Terry*.

At Hubbard's trial, O'Neill, Wilson, Ross and James testified to the facts detailed above. In addition, Special Agent Robert Fiatal, Caribbean Gang Drug Task Force supervisor, testified that Haqq, Eddie, and Kent Harris had been under investigation by the task force since late 1999 or early 2000. (J.A. at 385-86.) Garner and Hubbard also testified, both restating their testimony substantially as given during the suppression hearings, i.e., neither was aware that the bag contained drugs, nor was either aware of any drug trafficking activity. The parties stipulated that the amount of cocaine at issue was 6,992.8 grams. (J.A. at 421-422.) The jury found Hubbard guilty on both counts. (J.A. at 192.)

The court sentenced Hubbard to concurrent sentences of 262 months on the drug charge and 60 months on the weapons charge on October 19, 2000. (J.A. at 32.) Hubbard was given a three-level enhancement under U.S. Sentencing Guidelines ("U.S.S.G.") § 3C1.1(A) for his aggravating role

in the offense and a two-point enhancement for obstruction of justice under U.S.S.G. § 3C1.1(A) for giving perjured testimony. (J.A. at 436-39.) Garner was sentenced to a term of 121 months on the drug charge. (J.A. at 26.)

Garner now appeals solely on the issue of his denied motion to suppress the cocaine seized during the search of the duffel bag he had with him. Hubbard alleges the district court erred in unconstitutionally denying him his right to counsel of choice. Hubbard also alleges ineffective assistance of counsel. Hubbard further contends that he was denied a fair trial due to prosecutorial misconduct and the admission of evidence concerning other individuals mentioned in his confession, a confession Hubbard alleges was made as a result of undue delay in bringing him before a magistrate judge and, therefore, should have been excluded. Hubbard also argues that the government failed to produce adequate proof of an effect on interstate commerce at his trial. Hubbard also challenges the district court's instruction of the jury. Finally, Hubbard alleges that sentencing enhancements were made in violation of *Apprendi* and without any evidentiary support.

II. ANALYSIS

We first turn to Garner's sole assignment of error, the district court's denial of his motion to suppress the cocaine discovered in the duffel bag. On appeal, the court reviews the district court's findings of law *de novo* and findings of fact for clear error. *United States v. Matthews*, 278 F.3d 560, 561 (6th Cir. 2002).

Garner urges on appeal, as he did below, that the stop and search of his person and duffel bag were lacking the

requisite probable cause. Further, he argues that the stop by Wilson lacked even the reasonable suspicion necessary to perform a stop and protective frisk. Garner relies heavily on the fact that O'Neill effectively gave Garner permission to leave. Much is also made of the fact that O'Neill issued a ticket for a seat belt violation well after the defendant had been taken to the police station and from a different ticket book than the one issued to Hubbard for the same offense, the inference being that the ticket was an afterthought written to justify the stop by Wilson.

The government, echoing the justifications offered by the district court, argues that O'Neill was well within the limits of the law by requiring all of the passengers to remain in the car. The government cites *Maryland v. Wilson*, 519 U.S. 408, 137 L. Ed. 2d 41, 117 S. Ct. 882 (1997), in support of this proposition. In *Wilson* the Supreme Court held that a police officer's ordering of a driver and passengers within a car to exit during a traffic stop was not an unreasonable intrusion on Fourth Amendment rights, considering the greater danger to the officer when passengers are present. 519 U.S. at 414-15. The implication, of course, is that the reverse is true also, that requiring passengers to remain in the car for the safety of the officer is not unreasonable. The government further cites *United States v. Moorefield*, 111 F.3d 10 (3d Cir. 1997), in support. There, the Third Circuit, citing *Wilson,* held that a police officer's order to remain in the car was not unreasonable.

Finally, the government cites Ohio statutes making failure to comply with the lawful order of a police officer a first degree misdemeanor and an offense for which a person may be arrested. *See* OHIO REV. CODE § § 2921.33(A) &

2935.03(A) (West 2002). The government argues that Garner's exiting the vehicle and leaving the scene gave O'Neill, and through him, Wilson, the necessary probable cause to arrest Garner. Therefore, the search of the bag was incident to Garner's lawful arrest.

In the alternative, the government argues that the stop and search of Garner is justified under *Terry*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868. The government states that Wilson had a reasonable and articulable suspicion that Garner either had been, was, or was about to be involved in criminal activity. This suspicion, according to the government, justified stopping Garner and performing a protective search.

Reasonable suspicion, just as probable cause, is determined from the totality of the circumstances. *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989). However, in developing a reasonable suspicion that criminal activity is occurring, an officer must have more than an "inchoate and unparticularized suspicion or 'hunch.'" *Terry*, 392 U.S. at 27. Furthermore, "reasonable suspicion can be based upon police officers' own observations or upon the collective knowledge of other officers." *United States v. Braggs*, 23 F.3d 1047, 1049 (6th Cir. 1994).

In *Terry,* the Court held that an individual may be stopped and frisked for weapons if an officer, based on his observations and experience, determined that an individual is, was or will be engaged in criminal activity. 392 U.S. at 30. This protective search has since been expanded to include areas within the immediate control of a suspect. *See Chimel v. California*, 395 U.S. 752, 763, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969). Areas within the immediate control of a

suspect include the entire passenger area of a vehicle, including any packages or containers without regard for whom may own the packages or containers. *Wyoming v. Houghton*, 526 U.S. 295, 302, 143 L. Ed. 2d 408, 119 S. Ct. 1297 (1999).

With these principles in mind, we turn to the facts of this case. Much is made, both by the government and the district court, of Garner's departure from the scene of the traffic stop. The district court discounts the fact that O'Neill gave Garner permission to leave, albeit after much badgering by Garner and after having told him three times to remain in the car. O'Neill justified this action by testifying that he did not want to risk a confrontation with two suspects alone. The district court accepts this rationale, stating, "Garner fails to realize that Officer O'Neill's approval did not inoculate him from liability for his earlier refusal to comply with O'Neill's order to remain in the vehicle."

We believe the district court's justification requires too much from a suspect. O'Neill could have changed his mind and decided to let Garner go to work, as Garner claimed he needed to do. The district court would have a suspect read the inner workings of the mind of a police officer to determine the reason that officer says or does a particular thing. Therefore, the district court's reasoning that Garner had violated an Ohio statute by disobeying a lawful order of a police officer, thus, entitling the officer to place Garner under arrest, is faulty.

However, other facts, objectively viewed, do give rise to a finding of reasonable suspicion warranting a stop of Garner. O'Neill was aware that Garner urgently wanted to

leave, regardless of the reason given. He also was aware that Garner was accompanying a driver who was not the owner of the vehicle, that the vehicle's actual owner was in jail, and that the driver had no license. Also, the driver, Hubbard, had stated that there may be a warrant outstanding for his arrest. O'Neill was unaware of any bag until Garner removed it from the vehicle to carry it with him.

Based on these facts, O'Neill had reasonable suspicion sufficient to stop Garner. Furthermore, this reasonable suspicion was transferred to Wilson upon his arrival at the scene, *see Braggs*, 23 F.3d at 1049, and O'Neill's instruction to return Garner to the traffic stop. As Wilson approached Garner on the sidewalk, he noted that he was visibly shaking. Garner initially failed to respond to the officer. Also, when asked what was in the bag, Garner voluntarily responded jewelry or drugs.

Contrary to the district court's reasoning that the officer acquired probable cause to arrest based on Garner's departure from the scene of the traffic stop, we find that Wilson acquired probable cause to arrest Garner based on his statement concerning the contents of the bag. "'Probable cause' to justify an arrest means facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense." *Michigan v. DeFillippo*, 443 U.S. 31, 37, 61 L. Ed. 2d 343, 99 S. Ct. 2627 (1979); *see also Sandul v. Larion*, 119 F.3d 1250, 1256 (6th Cir. 1997) (holding that "[a] police officer is permitted to make an arrest if there is probable cause to believe that the arrestee has committed or is committing an offense.")

Garner's statement clearly indicated that he was in possession of some sort of illegal contraband, giving the police officer probable cause to take him into custody. Wilson took possession of the bag and placed Garner in the back of his police cruiser.

Because of the arrest, the search of the bag is permissible as a search incident to an arrest. This circuit has recently addressed a similar situation in *Northrop v. Trippett*, 265 F.3d 372 (6th Cir. 2001). In that case, the court upheld the search of a duffel bag police had observed Northrop place under a seat at a bus station. In so doing the court stated, "The right to search an item incident to arrest exists even if that item is no longer accessible to the defendant at the time of the search. So long as the defendant had the item within his immediate control *near* the time of his arrest, the item remains subject to a search incident to arrest." 265 F.3d at 379 (citations omitted) (emphasis added). Therefore, the ruling of the district court denying Garner's motion to suppress is affirmed, although based on a different reasoning.

Hubbard's first assignment of error is that he was denied his Sixth Amendment right to counsel of choice when the district court denied his motion to substitute counsel. The court reviews such claims for a district court's abuse of discretion. *See United States v. Williams*, 176 F.3d 301, 314 (6th Cir. 1999). In doing so, the court considers several factors: "timeliness of the motion; adequacy of the district court's inquiry into the matter; the extent of the conflict between the attorney and client and whether it resulted in a total lack of communication; and a balancing of these factors with the public's interest in the prompt and efficient

administration of justice." *Williams*, 176 F.3d at 314 (internal quotations and citations omitted).

Hubbard was represented by attorney James C. Young ("Young") at his arraignment and through his trial. Attorney Paul Mancino ("Mancino") filed a conditional entry of appearance on July 25, 2000, only six days before trial, his appearance conditioned on the trial court granting a continuance to allow Mancino to properly prepare. (J.A. at 173-176.) At his suppression hearing, Hubbard told the court he wanted to fire Young and replace him with Mancino. (J.A. at 322.) He further stated that Mancino was unavailable due to other trial obligations, but that the court should have received "a motion." (J.A. at 322.) The court acknowledged receipt of the conditional entry of appearance, and stated that Mancino could represent Hubbard, but that there would be no continuance based on "the fact that [Hubbard had] been through ... at least three attorneys already." (J.A. at 322.)

At this point, Hubbard stated that he and Young had not worked on the case together very much, only meeting two or three times. (J.A. at 323.) Young vigorously disputed this, calling it "totally untrue," (J.A. at 323.), and stating that he had met with Hubbard no less than six times. Hubbard stated that it was his belief that Young's law license had been suspended, to which the court responded, "He's not, so you are wrong. So we are going to proceed." (J.A. at 324.)

The district court did not abuse its discretion by denying Hubbard's request to substitute counsel. Mancino did not file his conditional entry of appearance until six days before Hubbard's trial was scheduled to begin. The district court inquired into the matter and determined Hubbard's

complaints to be unfounded. Nothing in the record indicates that Hubbard suffered from any communication problems with his attorney, much less a total lack of communication. The court was even willing to allow Mancino to represent Hubbard and offered to move the suppression hearing, but only if Mancino was prepared to go to trial as scheduled. With all of these considerations, the district court appears to have weighed them properly and given due weight to the public's interest in the prompt and efficient administration of justice. Under these circumstances, the district court's denial of Hubbard's substitution of counsel does not constitute an abuse of discretion.

Hubbard next appeals denial of his motion to suppress statements made to police while in their custody. Hubbard alleges these statements are the result of an unreasonable delay in bringing him before a magistrate judge. Hubbard further alleges that the delay was a violation of Fed. R. Crim. P. 5(a), which states in relevant part:

> An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate judge or, if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041.

As in the motion to suppress above, the court reviews a district court's findings of fact for clear error and legal conclusions *de novo*. *United States v. Matthews*, 278 F.3d

560, 561 (6th Cir. 2002). Failure to comply with the requirement of Federal Rule of Criminal Procedure 5(a) that an arrested person be brought before a magistrate judge without unnecessary delay "renders inadmissible statements obtained from an accused prior to his appearance before a magistrate." *United States v. Barlow*, 693 F.2d 954, 958 (6th Cir. 1982) (citations omitted). Delay is measured from the time federal custody begins. *Id.* Further, "for the purposes of Rule 5(a) the time which a defendant spends in state custody will not be attributable to federal detention in the absence of some working relationship between state and federal law enforcement personnel." 693 F.2d at 958. However, waiver of one's *Miranda* rights constitutes a waiver of one's rights under Rule 5(a). "A valid *Miranda* waiver also waives the prompt judicial warning of one's constitutional rights." 693 F.2d at 959.

Ross testified that he did not take Hubbard before a federal magistrate on the day of his arrest because Ross was not given permission to proceed federally until 3:30 p.m., at which time he was told by the federal prosecutor it was too late in the day to go before a magistrate. (J.A. at 332, 440P.) More importantly, Hubbard admitted that he was advised of his *Miranda* rights both at the time of his arrest and again at the police station. (J.A. at 336-37.) There is no indication in the record that Hubbard's statements to the police during a two-hour interview were anything less than voluntary. Hubbard's voluntary waiver of his *Miranda* rights equates to a waiver of his rights under Rule 5. The district court, therefore, is affirmed on this issue.

Hubbard further argues that the requirements of 18 U.S.C. § 3501(c) were violated. This argument is raised for

the first time on appeal. "Ordinarily, the courts of appeals do not consider claims or arguments that were not raised in the district court. But this is a prudential rule, not a jurisdictional one." *United States v. Hayes*, 218 F.3d 615, 619 (6th Cir. 2000). Because the district court was never given an opportunity to rule on this issue, this court also declines to address it.

Hubbard next alleges multiple instances of prosecutorial misconduct that deprived him of his constitutional right to a fair trial. Claims of prosecutorial misconduct are generally mixed questions of fact and law subject to *de novo* review. *United States v. Jackson-Randolph*, 282 F.3d 369, 384 (6th Cir. 2002). However, improper comments made by the prosecutor without objection are reviewed for plain error only. *United States v. Carroll*, 26 F.3d 1380, 1383 (6th Cir. 1994).

Prosecutorial misconduct rises to the level of a constitutional violation only when the misconduct "so infects the trial with unfairness as to make the resulting conviction a denial of due process." *Hill v. Brigano*, 199 F.3d 833, 847 (6th Cir. 1999). Although flagrant prosecutorial misconduct constitutes reversible error, "where the error is not flagrant, reversal is inappropriate if *either* proof of defendant's guilt is overwhelming, *or* defense counsel failed to object to the error, *or* if the trial court cured the error with an admonishment to the jury." *Carroll 26 F.3d at 1385, n.6* (emphasis in original). Flagrancy is determined by examining "(1) the tendency of the comments to mislead the jury or prejudice the defendant, (2) whether the comments were isolated or extensive, and (3) whether the comments were

made deliberately." *United States v. Brown*, 66 F.3d 124, 127 (6th Cir. 1995).

Hubbard alleges that the prosecutor deprived him of a fair trial by attempting to impeach him and Garner as to inconsistencies between their trial and suppression hearing testimony without laying a proper foundation, by asking Hubbard extensively about whether he knew that Haqq, Garner, Sylvester Harris, Kent Harris, and Eddie were drug dealers, and by making improper comments during opening and closing arguments. Hubbard cites the prosecutor's statements that Hubbard was a drug dealer, that Garner lied, (J.A. at 427), and that it was a "coincidence" that Haqq, Eddie, and Kent Harris also were under investigation for drug trafficking, (J.A. at 431-32.) Finally, Hubbard points to several instances in the prosecutor's opening and closing arguments where he told the jury that they would find "the truth," i.e., that Hubbard was guilty. (J.A. at 342-43, 427.)

The majority of these statements came in without objection. Hubbard did object to the prosecutor's question, "Sylvester Harris is in jail, isn't he?" (J.A. at 410), asked during cross-examination of Hubbard. He also objected to the prosecutor's failure to refer to the transcript of the suppression hearing during cross-examination of Garner. (J.A. at 388, 395.) The district court sustained Hubbard's objections regarding improper impeachment and instructed the jury to disregard the question and answer regarding whether Sylvester Harris was in jail. At the close of the evidence, the district court instructed the jury to base its determinations solely on the evidence before them and not the court's evidentiary rulings or the statements of counsel. (J.A. at 421.)

Turning to the standards enumerated above, the prosecutor's statements fail to constitute flagrant behavior. Nothing in the statements, on their face, would tend to mislead the jury or unduly prejudice the defendant, and Hubbard fails to indicate how, in fact, these statements would have any prejudicial effect. The statements appear to be isolated, and none of the statements appear to be deliberately made to prejudice the defendant. That being said, it is most telling that defendant's trial counsel failed to object to the majority of the statements. Those statements that were objected to were addressed by the court with instructions to the jury. Further, Hubbard's confession, the physical evidence seized, and the lack of credibility of Hubbard's and Garner's testimonies amount to overwhelming evidence supporting Hubbard's conviction. Therefore, Hubbard's challenge on this issue is without merit.

Hubbard next argues that the district court erred in admitting testimony about other drug dealers allegedly associated with him. This court reviews admissions of evidence for an abuse of discretion. *Gibson v. United States*, 271 F.3d 247, 254 (6th Cir. 2001). However, "an abuse of discretion that does not affect substantial rights is harmless error and is to be disregarded." *Id.* (citing Fed. R. Crim. P. 52(a)). Evidence admitted without objection is reviewed for plain error. *United States v. Fortson*, 194 F.3d 730, 736 (6th Cir. 1999).

At Hubbard's trial, several law enforcement officers testified that Haqq and Kent Harris, individuals implicated in Hubbard's confession, were currently under investigation for drug trafficking, as was Sylvester Harris, the person to whom the car Hubbard was driving was registered. However, given

Hubbard's testimony at trial that he was unaware that any of the individuals were involved in trafficking drugs, it was entirely proper impeachment testimony. It is likewise important to note that defense counsel failed to object to the vast majority of this testimony. Finally, with the abundance of evidence against Hubbard, there is no evidence that this testimony substantially prejudiced Hubbard. At worst, the admission of this testimony is harmless error. The district court's admission of this evidence was not an abuse of discretion and is, therefore, affirmed.

Hubbard also challenges a number of the jury instructions given by the court. Jury instructions to which the defendant objects, as a question of law, are reviewed *de novo*. *Fisher v. Ford Motor Co.*, 224 F.3d 570, 576 (6th Cir. 2000). However, if the defendant fails to object to an instruction given at trial, it is reviewed for plain error only. *United States v. Thomas*, 11 F.3d 620, 629 (6th Cir. 1993). In determining whether allegedly erroneous jury instructions violated the defendant's right to a fair trial, this court asks "whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury." *Fisher*, 224 F.3d at 575-76.

Hubbard first challenges the court's instruction regarding specific intent, which was as follows: "You may consider it reasonable to draw the inference and find that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted." Hubbard contends that this instruction creates an unconstitutional mandatory presumption. However, this circuit has upheld this specific instruction as permissible in *United States v. Reeves*, so long as "the charge also contains language clearly placing upon the

prosecution the burden of proof beyond reasonable doubt of all essential elements of the crime." 594 F.2d 536, 541 (6th Cir. 1979). In this case, the jury also was instructed that the prosecution bore the burden of proof. (J.A. at 425.) Therefore, Hubbard's challenge on this issue is without merit.

Hubbard next argues that the instructions given concerning possession were inapplicable to the facts of this particular case. Those instructions were as follows:

> Now, the law recognizes two types of- two kinds of possession: Actual possession and constructive possession.
>
> A person who knowingly has direct physical control of a thing at any given time is then in actual possession of it. I've got, for instance, a pencil here. I'm in actual possession of this pencil.
>
> A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.
>
> For example, I have pencils on my desk in my chambers. My law clerk will get them for me if I want them. And that's possession, also. That's constructive possession.

> The law also recognizes that possession may be sole or joint. If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.

(J.A. at 423-24.) Hubbard claims that these instructions were misleading because "there is absolutely no evidence that he ever touched or possessed the item in question." Hubbard states that the example cited by the district judge implies that the judge at one time at least touched the pencils on his desk, which is not the case here. Hubbard further argues that the instructions constructively amended the indictment because there was no allegation that possession was constructive or that it was joint.

Hubbard's counsel, however, did not object to these instructions at the time they were given. Viewing the evidence given at trial, these instructions were not plainly erroneous. Furthermore, these instructions closely track the language found in the Sixth Circuit pattern instruction. Therefore, district court is affirmed on this issue.

Hubbard also argues that the district court's instruction on aiding and abetting was erroneous because the indictment did not allege aiding and abetting. However, the indictment charges Hubbard with violating 18 U.S.C. § 2, which provides in part, "Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal." 18 U.S.C.A. § 2(a) (West 2002).

Hubbard also argues that the district court erred in its rejection of his request for an instruction informing the jury that mere presence at the scene of a crime is not enough to convict for aiding and abetting. The record reflects, however, that Hubbard's counsel discussed and specifically agreed to the instruction given. That instruction contained language that, "proof that the defendant may have known about the crime, even if he was there when it was committed, is not enough for you to find him guilty. Mere association with persons committing a crime is not enough for you to find him guilty." (J.A. at 426.) Because Hubbard's counsel was complicit in the instruction, this claim should be rejected.

Finally, Hubbard argues that the court erred in instructing the jury that in evaluating the credibility of the defendant's testimony, it should consider the same factors as it did in evaluating the credibility of other witnesses, including "evidence showing that the witness has been convicted of a felony."[1] (Hubbard Br. at 45.) Hubbard argues that this instruction misleadingly suggested that Hubbard had a prior felony conviction, which he did not. There was no evidence offered at trial suggesting that Hubbard had a felony conviction. Rather, as the government argues, this instruction was most likely given because of Garner's prior felony conviction. Moreover, there is no indication that the jury was confused by this instruction, and Hubbard provides no support on appeal for a conclusion that this instruction, if erroneous, constituted plain error. The district court, therefore, is affirmed on this issue.

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[1] This instruction is not included within the Joint Appendix.

Hubbard next argues that the government failed to prove an interstate commerce nexus to his drug trafficking offense, thus, depriving him of due process. This issue is brought up for the first time on appeal. Hubbard cites *U.S. v. Lopez*, 514 U.S. 549, 131 L. Ed. 2d 626, 115 S. Ct. 1624 (1995), in support. Normally, the court will not review challenges to constitutionality not raised before the district court. *United States v. Chesney*, 86 F.3d 564, 567 (6th Cir. 1996.) However, the court "may exercise [its] discretion to review an issue not raised below in exceptional cases or particular circumstances, or when the rule would produce a plain miscarriage of justice." *Chesney, 86 F.3d at 567-68* (internal quotations and citations omitted). As none of the foregoing conditions present themselves in this case, therefore, the court declines to address this issue.

Hubbard further argues that he was denied effective assistance of counsel because his trial attorney failed to object to the admission of certain evidence and to request particular jury instructions. "We generally will not review an ineffective assistance of counsel claim raised by a defendant for the first time on direct appeal." *United States v. Steverson*, 230 F.3d 221, 224 (6th Cir. 2000). Further, "such claims are best brought by a defendant in a post-conviction proceeding under 28 U.S.C. § 2255 before the district court in which the parties 'can develop an adequate record on the issue.'" *United States v. Hill*, 142 F.3d 305, 308 (6th Cir. 1998) (*quoting United States v. Daniel*, 956 F.2d 540, 543 (6th Cir. 1992)). A limited exception applies when the record is sufficient to determine the merits of the defendant's allegations. *Id.* Such is not the case here. It is not readily apparent that Hubbard's trial counsel was constitutionally deficient. The court, therefore, declines to address this issue as well.

In his final issue on appeal, Hubbard challenges the three-level enhancement in his offense level under U.S.S.G. § 3B1.1(a) for his aggravating role in the offense and his two-level enhancement under U.S.S.G. § 3C1.1(A) for obstruction of justice. Hubbard first argues that these enhancements are in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). Hubbard's second argument is that these enhancements are not supported by the evidence.

The district court's assessment of a defendant's role in criminal activity is a factual determination reviewed on appeal for clear error. *United States v. Caseslorente*, 220 F.3d 727, 734 (6th Cir. 2002). In reviewing sentencing determinations, this court reviews the district court's findings of fact for clear error and the district court's application of the sentencing guidelines to the facts *de novo*. *United States v. Smith*, 39 F.3d 119, 122 (6th Cir.1994).

Apprendi is inapplicable in this case. The Supreme Court decided in *Apprendi* that the Constitution requires any fact that increases the penalty for a crime beyond the statutory maximum to be submitted to a jury and proven beyond a reasonable doubt. 530 U.S. at 490. Hubbard was found guilty of possession with intent to distribute more than five kilograms of cocaine in violation of 21 U.S.C. § § 841 (a)(1) and (b)(1)(A), and 18 U.S.C. § 2. The statutory maximum for this crime is life imprisonment. Yet, Hubbard was sentenced to 262 months. Clearly, this sentence is less than life imprisonment. A sentence increased pursuant to the sentencing guidelines based on a court's findings by a preponderance of the evidence is not improper when the defendant's sentence falls within the statutory maximum for

the crime. *United States v. Schulte*, 264 F.3d 656, 660 (6th Cir. 2001).

Hubbard's claim that the enhancements are unsupported by the evidence is likewise unavailing. The district court gave the two-level enhancement for obstruction of justice after determining that Hubbard perjured himself on the stand. The court further enhanced the offense level by three levels after determining that Hubbard was a manager or supervisor based on his supervisory control over Garner. A simple review of the record reveals that these findings are not in clear error. Therefore, the sentence imposed by the district court is affirmed.

III. Conclusion

For the foregoing reasons, we **AFFIRM** the district court's judgment as to all issues raised on appeal.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:00-CR-262

[Filed July 19, 2000]

UNITED STATES OF AMERICA, Plaintiff,	)
v.	)
FRANK J. GARNER, JR., Defendant.	)

JUDGES:
Hon. James S. Gwin, U.S. District Court.

ORDER

On July 10, 2000, Defendant Frank Garner, Jr. filed a motion to suppress [Doc. 19]. In this case, the United States charges Garner with possession with intent to distribute 6,992.8 grams of cocaine. Defendant Garner now seeks to suppress property seized during his detention by law enforcement authorities on May 16, 2000, as well as statements made during his detention. For the reasons that follow, the Court denies the motion to suppress.

District Court Order - 7/19/00

I. Background

On the afternoon of May 16, 2000, the Cleveland Police Department made a traffic stop that led to the arrest of Defendant Garner and Co-defendant Lindira Hubbard. At that time, Cleveland Police Officer Joseph O'Neill saw a white 1998 Ford Expedition traveling east on St. Clair Avenue in Cleveland. After Officer O'Neill noticed that the truck did not have a front license plate, he stopped the vehicle. Both the Ohio Revised Code and City of Cleveland Ordinance § 435.09a require such a license plate and provide for a citation for failing to have one. Lindira M. Hubbard was driving and Defendant Garner was in the front passenger seat.[1]

Officer O'Neill asked Hubbard for his license and registration. Hubbard responded that he did not have his license, that the truck did not belong to him, and that there might be an active warrant seeking his arrest. Officer O'Neill then instructed Hubbard and Garner to remain in the truck while he checked Hubbard's information and his driving status. Officer O'Neill discovered that Hubbard did not have a valid driver's license.

While Officer O'Neill was on his radio, Garner attempted to exit the truck several times. Officer O'Neill ordered Garner back into the truck on each occasion. Garner eventually exited the truck and began walking away. He carried a black duffel bag with him as he walked. Officer

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[1] Officer O'Neill also noticed that Garner was not wearing his seat-belt in violation of City of Cleveland Ordinance § 437.27(b)(2). Garner was ultimately issued a traffic ticket for this offense.

O'Neill ordered Garner back into the truck. Garner stated that he was late for work and continued to walk east down St. Clair Avenue. Rather than pursue Garner, Officer O'Neill remained with the truck and radioed for back-up.

Within moments, Cleveland Police Officer Paul Wilson arrived in his car to assist. Officer O'Neill told Officer Wilson what had just happened and asked Officer Wilson to bring Garner back to the truck.

Officer Wilson caught up to Garner and told him that he needed to return to Officer O'Neill's location. Garner was holding the duffel bag in his right hand and was shaking. Garner did not respond to Officer Wilson's instruction. Officer Wilson planned to drive Garner back to Officer O'Neill's location in his zone car. Officer Wilson again told Garner that he would have to return with him and then asked him what was in the bag. Garner responded that he had just "found" the bag near the railroad tracks and that it contained "jewelry or drugs." At this time, Officer Wilson escorted Garner to his zone car and sat him in the back seat. Defendant Garner sat in the back seat with the door open.

Officer Wilson conducted a pat-down of Garner for his own protection and told him that they would open the bag together to see what was inside. Upon opening the bag, Officer Wilson discovered numerous, brick-shaped packages which he believed were drugs. Officer Wilson placed Garner under arrest, locked him in the rear of his zone car, and returned to Officer O'Neill's location.

O'Neill and Wilson then arrested co-defendant Hubbard. During the arrest, Hubbard advised the officers that

he had a gun. Following up, the officers found that Hubbard had a .45 semi-automatic in his pants. O'Neill and Wilson also found marijuana in plain view in a cup within the truck.

Garner acknowledges that O'Neill advised him of his constitutional rights before transporting him to the Sixth District Police Station. The truck was also taken to the Sixth District impound lot and searched. A small bag of marijuana was found in the console between the driver and passenger seats.

While at the station, Hubbard and Garner were again advised of their rights and interviewed by officers with the Caribbean Gang Drug Task Force. Garner waived his rights and made a statement. In his statement, Garner told the officers the implausible story that he had "found" the bag near the railroad tracks by London Avenue, and that additional bags were at the same railroad location. Garner never explained why, if he was taking the drugs to the police, he had not initially notified O'Neill or Wilson. He also failed to explain why he was traveling away from the police station if he was going to turn the drugs into the authorities.

On June 14, 2000, Hubbard and Garner were named in a two-count indictment charging them both in count one with possession with the intent to distribute cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A), and 18 U.S.C. § 2. Additionally, Hubbard was charged in count two of the indictment with using or carrying a firearm during or in relation to a drug trafficking offense in violation of 18 U.S.C. § 924(c)(1).

Garner now asks the Court to suppress both the evidence seized from his duffel bag and the statements he made incident to his detention and arrest. The Court considers Garner's motion below.

II. Analysis

A. Admissibility of Evidence in Duffel Bag

The Court first considers the admissibility of the evidence recovered from Defendant Garner's duffel bag. Garner argues that Officer Wilson violated the Fourth Amendment of the United States Constitution in detaining him and searching his duffel bag. The Court disagrees.

1. Lawfulness of Detention

First, the Court decides whether Officer Wilson lawfully detained Garner after he exited the vehicle. As explained below, the Court finds the detention was lawful.

The Fourth Amendment prohibits unreasonable seizures. Thus, law enforcement officers do not possess unlimited authority to detain individuals. Specifically, an officer cannot arrest an individual absent probable cause, *i.e.*, a "fair probability" that the individual has either committed or intends to commit a crime. *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 109 S. Ct. 1581 (1989). Further, an officer cannot even briefly detain an individual unless the officer reasonably suspects the individual has been involved in criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).

Here, Officer Wilson detained Defendant Garner as he walked away from the scene of the traffic stop. Regardless if Officer Wilson's initial encounter with Garner is considered an arrest or simply a brief investigatory stop, the detention is lawful. Wilson had both probable cause to arrest and a reasonable basis for briefly detaining Garner.

Wilson had probable cause to arrest Garner because he failed to comply with a lawful police order. Under Ohio law, failure to comply with the lawful order of a police officer is a first degree misdemeanor. *See* OHIO REV. CODE 2921.33.1(A). An officer is authorized to arrest an individual for failing to comply with a lawful order. *See* OHIO REV. CODE 2935.03(A).

During the traffic stop, Garner failed to comply with an order issued by Officer O'Neill. After initially stopping the vehicle, Officer O'Neill ordered both occupants to remain seated in the vehicle. Garner disobeyed this order when he exited the truck and began walking away from the scene. O'Neill then ordered Garner to return to the truck. Again, Garner refused to comply with O'Neill's order.

Further, Officer O'Neill acted lawfully in ordering Garner to remain in the vehicle. The United States Supreme Court has recently held that a police officer may order passengers out of a vehicle during a traffic stop without violating the passengers' Fourth Amendment rights. *See Maryland v. Wilson*, 519 U.S. 408, 415, 137 L. Ed. 2d 41, 117 S. Ct. 882 (1997). The Court reasoned that the public interest in protecting an officer's safety outweighed the minimal intrusion involved in requiring passengers to exit the vehicle. *See id.* at 413-15. The same rationale applies here.

An officer may reasonably conclude that his safety is best protected by having the passengers remain in the vehicle. Further, the intrusion involved with having passengers remain in their vehicle is *de minimis*--the officer is merely maintaining the status quo. *See United States v. Moorefield,* 111 F.3d 10, 11 (3d Cir. 1997) (holding that police officer may order passengers to remain in vehicle with hands up during traffic stop).

Defendant Garner refused to comply with Officer O'Neill's lawful order to remain in the vehicle. In doing so, Garner violated Ohio law. Thus, having discussed the situation with Officer O'Neill, Officer Wilson had probable cause to detain Garner.

Moreover, even if viewed as something less than an arrest, Officer Wilson's detention of Defendant Garner was lawful. A law enforcement officer may stop and briefly detain an individual the officer reasonably suspects has been or is about to be involved in criminal activity. *See Terry*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868. Such a detention, often referred to as a "*Terry* stop," allows an officer to do more than merely "shrug his shoulders" when he reasonably suspects criminal activity is afoot, but lacks the information necessary for probable cause:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an

> intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at that time.

Adams v. Williams, 407 U.S. 143, 145-46, 32 L. Ed. 2d 612, 92 S. Ct. 1921 (1972).

Reasonable suspicion is gauged from the totality of the circumstances. *See Sokolow*, 490 U.S. at 7. This level of suspicion is, of course, less than proof of wrongdoing by a preponderance of the evidence. *See INS v. Delgado*, 466 U.S. 210, 217, 80 L. Ed. 2d 247, 104 S. Ct. 1758 (1984). The officer involved need only articulate some minimal, objective basis for the stop. *See Sokolow*, 490 U.S. at 7.

Here, Officer Wilson had reasonable grounds for detaining Defendant Garner. From his conversation with Officer O'Neill, Wilson knew that Garner had already fled the scene of the traffic stop. And as he approached Garner, Wilson observed Garner visibly shaking. Under these circumstances, the Court finds that it was the "essence of good police work" for Officer Wilson to detain Garner "to maintain the status quo momentarily while obtaining more information." *Adams*, 407 U.S. at 145-46.

2. Lawfulness of Search

Having determined that Officer Wilson lawfully detained Defendant Garner, the Court must now consider

whether Wilson lawfully searched Garner's duffel bag. The Court finds the search was lawful.

Just as it prohibits unreasonable seizures, the Fourth Amendment prohibits unreasonable searches. Generally, law enforcement officers may conduct a search only pursuant to a valid search warrant. However, certain exceptions to the warrant requirement exist. In this case, the Court finds that Officer Wilson's search falls within such an exception.

First, if Garner's detention is viewed as an arrest, the duffel bag search is permissible as a search incident to a lawful arrest. *See United States v. Robinson*, 414 U.S. 218, 224, 38 L. Ed. 2d 427, 94 S. Ct. 467 (1973) ("It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment."). Such a search may extend to both the arrestee's person and the area within the arrestee's immediate control. *See Chimel v. California*, 395 U.S. 752, 763, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969). An area within an arrestee's control includes any area "into which an arrestee might reach in order to grab a weapon or evidentiary items. . . ." *Id.*

The duffel bag was within Garner's immediate control. He held the bag in his hand and could have quite easily grabbed any weapons contained therein. Officer Wilson thus had the authority to search the bag.

The search is justified even if Officer Wilson did not actually arrest Garner, but rather briefly detained him as authorized under *Terry*. An officer may lawfully conduct a protective search while conducting a *Terry* stop. In particular,

the Supreme Court has held that a police officer may perform a limited search for weapons during a *Terry* stop when the officer reasonably suspects the individual being detained may be armed and dangerous. *See Terry*, 392 U.S. at 30-31.

Determining whether an officer's protective search is reasonable for purposes of the Fourth Amendment involves two inquiries. First, the Court must decide whether the search was justified at its inception. Second, the Court must determine if the search was reasonably related in scope to its protective purpose. *See id.* at 19-20.

To initiate a protective search, an officer need not be absolutely certain that a suspect is armed. Rather, the inquiry focuses on "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 20.

Here, the Court finds that Wilson had a reasonable basis for concluding his safety was in danger. Defendant Garner had already disobeyed the order of Wilson's fellow officer and left the scene of a traffic stop. This act of disobedience, coupled with Garner's unstable demeanor, supported Wilson's belief that Garner posed a potential threat to his safety.

Next, the Court must determine whether Officer Wilson was justified in extending his protective search to Garner's duffel bag. Although the protective search endorsed in *Terry* involved only a pat-down of a suspect's outer clothing, the Supreme Court has held that a protective search need not be so limited. In *Michigan v. Long*, the Supreme Court recognized that a protective search can include areas

from which an individual may gain immediate access to weapons, including the passenger compartment of an automobile. 463 U.S. 1032, 1046-47, 1049, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983).

In this case, Defendant Garner could have gained immediate access to a weapon contained in his duffel bag. And Garner informed Officer Wilson that the bag might contain drugs, thus alerting Wilson to the very real possibility that the bag also contained weapons. Wilson was therefore justified in ensuring the bag did not contain any weapons. In doing so, Wilson had no choice but to open the bag. The thick material from which the bag was constructed prevented Wilson from detecting weapons by merely patting the outside of the bag. *See United States v. Vaughan*, 718 F.2d 332, 335 (9th Cir. 1983) (finding that agents unlawfully searched contents of a soft and thin briefcase when "any weapons could have been felt through the cover").

Thus, as explained above, Officer Wilson's search of the duffel bag is lawful as either a search incident to a lawful arrest or a protective search under *Terry*. The evidence recovered from the bag is therefore admissible.

B. Admissibility of Statements Made During Detention

Defendant Garner next asks the Court to suppress various statements he made to law enforcement authorities on the day of his arrest. The Court finds no grounds for suppressing Garner's statements.

During the suppression hearing, Garner testified that the detectives questioning him refused to honor his request to

speak to his attorney before answering any questions. Because the detectives failed to respect his invocation of his *Miranda* rights, Garner says any statements made to the authorities are inadmissible at trial.

Detective Ronald Ross also testified during the suppression hearing. Detective Ross's testimony differs from that given by Defendant Garner. According to Detective Ross, Garner received his *Miranda* warning and then agreed to speak with the authorities present. Detective Ross never indicated that Defendant Garner had asked to speak with his attorney.

The Court credits Detective Ross's testimony. The Court does so based upon its evaluation of the relative credibility of Ross and Garner. In light of his generally implausible testimony and his demeanor on the stand, the Court finds no grounds upon which to believe Garner's self-serving claim that the authorities ignored his request to speak with his attorney.

Thus, the Court finds that Garner received his *Miranda* warning, and voluntarily waived his right not to cooperate with authorities. Any statements Garner made to the authorities after waiving his *Miranda* rights are therefore admissible at trial.

IT IS SO ORDERED.

Date: July 19, 2000

/s/ _____
Hon. James S. Gwin
U.S. District Court